Decision 02-01-037 January 9, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation whether Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and their respective holding companies, PG&E Corporation, Edison International, and Sempra Energy, respondents, have violated relevant statutes and Commission decisions, and whether changes should be made to rules, orders, and conditions pertaining to respondents' holding company systems.	Investigation 01-04-002 (Filed April 3, 2001)
In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) for authorization to implement a plan of reorganization which will result in a holding company structure.	Application 87-05-007 (Filed May 6, 1987)
In the Matter of the Application of San Diego Gas & Electric Company (U 902-M) for Authorization to Implement a Plan of Reorganization Which Will Result in a Holding Company Structure.	Application 94-11-013 (Filed November 7, 1994)
In the Matter of the Application of Pacific Gas and Electric Company (U 39 M) for Authorization to Implement a Plan of Reorganization Which Will Result in a Holding Company Structure.	Application 95-10-024 (Filed October 20, 1995)
Joint Application of Pacific Enterprises, Enova Corporation, Mineral Energy Company, B Mineral Energy Sub and G Mineral Energy Sub for Approval of a Plan of Merger of Pacific Enterprises and Enova Corporation With and Into B Mineral Energy Sub ("Newco Pacific Sub") and G Mineral Energy Sub ("Newco Enova Sub"), the Wholly Owned Subsidiaries of a Newly Created Holding Company, Mineral	Application 96-10-038 (Filed October 30, 1996)

Energy Company.

DECISION ON MOTIONS TO DISMISS FOR LACK OF JURISDICTION

Respondents PG&E Corporation (PG&E Corp.), Edison International (EIX), and Sempra Energy (Sempra) (collectively, the holding companies) seek dismissal of this proceeding as it pertains to them for lack of jurisdiction. They contend that the conditions we imposed in our decisions authorizing the formation of the holding companies are only parts of a contract between the Commission and the holding companies, and therefore are enforceable only in an action for breach of contract in Superior Court. They further contend that we have no continuing jurisdiction to unilaterally change these conditions or to impose new ones.

We deny the motions. Although the conditions we imposed may also be contractual, they are valid Commission orders that the Commission had jurisdiction to issue as necessary to fulfilling the Commission's duty to protect ratepayers from the risks that attended the formation of the holding companies. As validly issued Commission orders, they are enforceable in this proceeding. Because they are valid orders, the Commission also has jurisdiction pursuant to section 1708 of the Public Utilities Code to reexamine them, and modify or add to them as necessary to protect the public interest.

I. Background

A. The Underlying Proceedings.

In 1985, San Diego Gas and Electric Company (SDG&E) applied to this Commission, under Section 854 of the Public Utilities Code, to reorganize under

a holding company structure.[1] Specifically, SDG&E sought to form a new holding company to which SDG&E would transfer ownership of (a) all of its common stock, and (b) all of its non-utility subsidiaries.[2] The Commission approved that application, subject to a variety of conditions the Commission found were necessary to protect the public interest.[3] SDG&E ultimately decided not to form its holding company at that time, primarily because it did not want to comply with certain of those conditions, including conditions applicable to SDG&E's holding company and its affiliates.[4]

One year later, Southern California Edison Company (SCE) applied, also under Section 854, to reorganize under a holding company structure.[5] We approved the application, once more contingent on certain conditions designed to protect the public interest.[6] Specifically, the conditions we imposed were intended to mitigate the dangers stemming from the reorganization so that ratepayers would be indifferent to the change.[7] As required by the Commission's order, SCE filed a written notice agreeing to the conditions.[8]

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[1] *See* Application (A.) 85-06-003.

[2] *See* D.86-03-090, 20 CPUC 2d 660, 663 (1986).

[3] *See id.* at 669-70, 676-77, 690-92.

[4] *See* D.88-01-063, 27 CPUC 2d 347, 396 (1988).

[5] *See* A.87-05-007.

[6] *See id.* at 374-75.

[7] *See id.* at 366.

[8] *See id.* at 376; *see also id.* at 374 (authorization "contingent on acceptance by Edison, SCE Holding Company, and Edison Merger Company of the following conditions"); Acceptance of Conditions Adopted in Decision 88-01-063, filed Feb. 24, 1988. Pursuant

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In 1995, SDG&E returned to the Commission, once again seeking authorization to reorganize under a holding company structure.[9] At the time, the Commission determined that the reorganization involved no change in actual control of SDG&E, and therefore decided the application could proceed under Section 818 of the Public Utilities Code, rather than Section 854.[10] Despite this difference, we once again imposed certain conditions on the utility and its holding company as a prerequisite to our approval, designed to maintain ratepayer indifference and protect the public interest.[11] And we required the utility and holding company to pass board resolutions signifying their agreement to those conditions.[12] Both the utility and its holding company passed resolutions signifying their agreement.[13]

The same pattern continued in two more applications. In 1996, Pacific Gas and Electric Company (PG&E) applied under section 818 of the Public Utilities

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to Rule 73 of the Commission's Rules of Practice and Procedure, the Commission takes official notice of this document, which was filed in A.87-05-007.

[9] *See* A.94-11-013.

[10] Section 818 covers a utility's issuance of debt or equity instruments, while Section 854 relates to a change in utility ownership or control. *See* D.95-12-018, 62 CPUC 2d 626, 635 (1995).

[11] *See id.*, 62 CPUC 2d at 635, 649-52.

[12] *See id.* at 649-52.

[13] *See* SDG&E Notice of Agreement to Conditions, filed Dec. 29, 1995, Exhibits 1 and 2 thereto (Dec. 18, 1995 Resolutions by SDG&E Board of Directors and Enova Corporation Board of Directors.) Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, the Commission takes official notice of these board resolutions, which were filed in A.94-11-013.

Code to reorganize under a holding company structure.[14] We approved that application, subject to a number of conditions designed to maintain ratepayer indifference and protect the public interest, and subject to the agreement of PG&E's and its holding company's boards of directors.[15] The following year, SDG&E's parent holding company, Enova Corporation, applied to merge with Pacific Enterprises, to form a new holding company that would own SDG&E, and which eventually became Sempra Energy.[16] We approved this application pursuant to Section 854 of the Public Utilities Code, once more imposing certain conditions intended to protect the public interest, and requiring that the newly formed holding company agree to those conditions.[17]

B. Procedural History of These Motions.

The Commission instituted these proceedings to investigate whether the holding companies and/or their utilities violated, *inter alia*, the conditions we imposed when we authorized the formation of the holding companies; to investigate whether changes, including changes in the conditions, should be

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[14] *See* A.95-10-024.

[15] *See* D.96-11-017, 69 CPUC 2d 167, 181, 185 (1996); D.99-04-068, 194 PUR4th 1, 43-45 (1999); Compliance Filing of PG&E Co. With Ordering Paragraph 25 of Decision 96-11-017, filed Dec. 20, 1996, Attachment A thereto (Dec. 18, 1996 Resolutions of PG&E Co. and PG&E Corp. Boards of Directors). Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, the Commission takes official notice of these board resolutions, which were filed in A.95-10-024.

[16] *See* A.96-10-038.

[17] *See* D.98-03-073, 184 PUR4th 417, 465, 498, 501-04 (1998); Applicant's Compliance Filing by Sempra Energy, filed Aug. 14, 1998, Exhibits A, B, C (Board resolutions of Pacific Enterprises, Enova Corp., Sempra Energy). Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, the Commission takes official notice of these board resolutions, which were filed in A.96-10-038.

made on a going forward basis; and to determine, should we find that violations occurred, what remedies, if any, should be imposed. The holding companies thereafter moved to dismiss. They argued that the Commission only has "subject matter jurisdiction" over "public utilities," that the holding companies are not public utilities, and that, even their own agreement to be bound by conditions in our decisions establishing the holding companies did not effect a waiver of the jurisdictional objections or estop them from raising such objections.

After considering briefing on the issue, we released a draft decision denying the motions. We based our decision principally on the principle of estoppel, holding that the holding companies' acceptance of our authorization to form, combined with their failure to challenge our jurisdiction to impose the conditions at the time we imposed them precluded them, years later, from challenging our authority to enforce the conditions in this proceeding. Alternatively, we held that the statutes that obligate the Commission to protect ratepayers whenever it approves the formation of a holding company system give the Commission implied jurisdiction to issue orders that are binding on the holding companies as conditions to the Commission's approval.

In comments on that draft decision, the holding companies changed their focus significantly. Where once they had appeared to contest the Commission's authority to enforce the conditions anywhere, they now conceded that the conditions were enforceable – but asserted that we could only seek such enforcement in court in an action for breach of contract, rather than in a Commission proceeding such as this one. The holding companies claimed the draft decision misstated their positions and asserted that their comments simply clarified their original motions, despite the fact that neither Sempra's nor EIX's original motions even hinted at their new contract theory, and despite the fact that PG&E Corp., far from conceding enforceabity of the conditions, merely

suggested in a footnote that, "To the extent the Commission might contend that the Conditions create some type of continuing relationship between the Commission and PG&E Corporation, that relationship, if any, could be nothing more than contractual."[18]

This decision deviates from the draft decision to address the arguments raised for the first time in the holding companies' comments. Despite their new arguments, however, we still conclude that their motions to dismiss should be denied.

II. Discussion

A. The Conditions are Valid Commission Orders, and Therefore Enforceable in a Proceeding Before the Commission

The holding companies argue that the conditions imposed on them are merely provisions of a contract between them and the Commission, and therefore only enforceable in Superior Court in an action for breach of contract. If the Commission had jurisdiction to promulgate the conditions as valid orders, however, then they are enforceable in proceedings before the Commission, regardless of whether they might *also* be enforceable contractually (an issue we need not reach).[19] We conclude that they are valid Commission orders, and therefore enforceable in this proceeding.

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[18] *PG&E Corporation's Motion to Dismiss For Lack of Subject Matter Jurisdiction,* April 24, 2001, at 7 n.4.

[19] The fact that the orders also required the holding companies and utilities to adopt board resolutions agreeing to the conditions does not indicate that the Commission believed that it needed a contract with the holding companies to enable it to enforce the conditions. The Commission regularly requires utilities to pass board resolutions agreeing to orders that the Commission indisputably has jurisdiction to issue and enforce in its own proceedings. *See, e.g., Application of Pacific Gas & Elec. Co.*, D.01-05-

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1. The Commission Can Enforce Its Own Orders

The Commission has jurisdiction to enforce its own orders, and need not institute an action in Superior Court to do so. As we have observed, "it would be illogical and unreasonable" to interpret the governing statutes as allowing us to issue binding orders, but then forbidding us from enforcing those orders in Commission proceedings.[20] Thus, for example, we consistently have held that we have jurisdiction to impose fines for violations of our orders, and need not proceed directly to Superior Court to do so.[21] The California Supreme Court routinely lets such determinations stand.[22]

Moreover, there is no question, contrary to the holding companies' contentions, that the Public Utilities Code contemplates the Commission's jurisdiction to enforce its orders against non-utilities. For example, Section 2107 of the Code pertains to the Commission's jurisdiction to impose penalties on utilities that violate Commission orders, and as noted above, we routinely do so in Commission proceedings. Section 2111 is identical to Section 2107 in every respect, except that it expressly pertains to violations of Commission orders by "[e]very corporation or person, *other than a public utility*, . . . which or who knowingly violates or fails to comply with . . . any order, decision, rule, direction,

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059, 2001 Cal. PUC LEXIS 413, at *130-135 (May 14, 2001). It does so not because it believes the resolutions are necessary to create enforceable contractual conditions, but to require an affirmative gesture on the part of the regulated entity, and to ensure that the entity fully understands and intends to comply with the Commission's order.

[20] *Pacific Bell v. MCI Telecommunications Corp.*, D.98-11-063, 1998 Cal. PUC LEXIS 707, at *58.

[21] *See Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Futurenet*, D.99-06-055, 1999 Cal. PUC LEXIS 311, at *15.

[22] *See id.*

demand, or requirement of the commission."[23] If the Commission lacked jurisdiction to enforce its orders as against entities that are not public utilities, as the holding companies assert, Section 2111 would be meaningless. Section 2113 similarly contemplates that Commission orders may be issued against non-utilities and enforced in Commission proceedings, providing, in relevant part, that "[e]very public utility, corporation, or person which fails to comply with any part of any order" of the Commission is punishable for contempt by the Commission.[24]

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[23] Section 2107 provides, in full:

> Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($ 500), nor more than twenty thousand dollars ($ 20,000) for each offense.

Section 2111 provides, in full:

> Every corporation or person, other than a public utility and its officers, agents, or employees, which or who knowingly violates or fails to comply with, or procures, aids or abets any violation of any provision of the Constitution of this state relating to public utilities or of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance, in a case in which a penalty has not otherwise been provided for such corporation or person, is subject to a penalty of not less than five hundred dollars ($ 500), nor more than twenty thousand dollars ($ 20,000) for each offense.

[24] Section 2113 provides, in full:

> Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same

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2. The Conditions Imposed on the Holding Companies Constitute Valid Commission Orders and Therefore are Enforceable in Commission Proceedings

In addition to authority expressly conferred on an administrative agency, an agency has implied authority to "adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of powers expressly granted."[25] Accordingly, "the commission's powers are not limited to those expressly conferred on it . . . . [Instead,] the commission [may] do all things, whether specifically designated in the Public Utilities Act or in addition thereto, which are necessary and convenient in the exercise of its jurisdiction over public utilities."[26]

On the basis of these principles, the Supreme Court has affirmed our authority to impose conditions on non-utilities doing business with utilities in carrying out our statutory duty to protect the public. For example, in *Henderson v. Oroville-Wyandotte Irrigation District*, 213 Cal. 514 (1931), two water utilities

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extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto.

[25] *Lusardi Constr. Co. v. Aubry*, 1 Cal. 4th 976, 989 (1992) (quoting *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal. 2d 287, 303 (1943)).

[26] *San Diego Gas & Elec. Co. v. Superior Ct.*, 13 Cal. 4th 893, 915 (1996) (internal quotations omitted) ; *see also City of Los Angeles v. Public Util. Comm'n*, 7 Cal. 3d 331, 344 (1972); *see also General Tel. Co.*, 34 Cal. 3d 817, 826 (1983) (noting the "commission's powers to control the relationship between utilities and their parents or affiliates"); *Capital Telephone Co., Inc. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) (regulatory agencies may disregard separate corporate identity when necessary to fulfill their express statutory duties).

under the express jurisdiction of the Railroad Commission sought the Commission's approval to transfer certain of their facilities to the defendant Irrigation District, over which the Commission had no general regulatory jurisdiction.[27] After the utility applied for permission to sell its facilities to the Irrigation District, water users filed a protest, apprehensive about the rates the District might charge.[28]

The protestors and the District ultimately settled their dispute, memorialized by a resolution of the District's board of directors, in which the District promised to charge only certain rates.[29] The Commission ultimately issued an order authorizing the sale, on the condition, *inter alia*, that the District only charge those agreed-upon rates.[30] When the District later tried to charge different rates, the protesters brought a declaratory judgment action in superior court to determine each party's rights and duties under the settlement. The District defended on two distinct grounds: (1) because its agreement with the protesters was not evidenced by a "formal or written" contract, but only by its unilateral board resolution, the District claimed it was not bound by any contract between it and the protesters; and (2) apart from any contract with the protesters, the District contended that it was not bound "by the order of the Railroad Commission," because the Commission had no jurisdiction over the District as it was not a public utility.[31]

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[27] *Henderson*, 213 Cal. at 517-18.

[28] *See id.* at 518.

[29] *See id.* at 518-21.

[30] *See id.* at 522.

[31] *See id.* at 524-25, 529-30.

In response to the first defense, the court held that even though the contract was not evidenced by any formal written agreement, it still was a binding agreement between the District and the water users.[32] The court then turned to the District's separate contention that the Commission's order imposing conditions on it was not binding because the Commission lacked jurisdiction over it, the precise issue presented here. The court held that although the Commission lacked general regulatory jurisdiction over the District because it was not a utility, the conditions *were* binding Commission orders, because the Commission did have limited jurisdiction to impose those conditions.[33] The Supreme Court held that although no statute expressly granted the Commission authority to regulate the non-utility, "[i]n approving or authorizing such a sale, the Railroad Commission *has jurisdiction* to impose such conditions as will in the judgment of the Railroad Commission protect and safeguard the pre-existing rights of those entitled to service under [the selling] public utility."[34]

Exactly the same situation was present in each of our decisions authorizing the formation of respondent holding companies. In each case, we determined that imposing certain conditions on these reorganizations was necessary to "protect the public interest," or to maintain "ratepayer indifference." Just as we had authority to impose such conditions for those purposes in *Henderson*, we had authority to impose those conditions here,

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[32] *See id.* at 525-29.

[33] *See id.* at 529-30.

[34] *Id.* at 530 (emphasis added).

because their imposition was "necessary to the due and efficient exercise of powers expressly granted."[35]

In their comments on the draft decision, the holding companies contend that *Henderson* supports their position that the conditions we imposed are only contractual, and only enforceable in superior court. They misread *Henderson*. For example, EIX argues that the Court "made clear that the binding force of the [Commission's] conditions arose from their status as contract terms."[36] EIX's quotations from the case regarding the Irrigation District being "bound by its contract," however, refer to the Irrigation District's contract with the plaintiff water users – the first of the two issues presented in *Henderson* , not any kind of contractual relationship between the Irrigation District and the Commission. Nowhere in the decision does the court hold that conditions in a Commission order are merely contractual provisions. Nor does the court hold that if the Commission were to bring an enforcement action it must do so in state court.[37]

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[35] *Lusardi*, 1 Cal. 4th at 989 (1992). Where the Supreme Court has ruled that the Commission has exceeded its authority, the Court determined that there was an insufficiently close relationship between the order at issue and "the due and efficient exercise of powers expressly granted." *Lusardi Constr.*, 1 Cal. 4th at 989. So, for example, the Supreme Court explained its holding in *Pacific Tel. & Tel. Co. v. Public Util. Comm'n*, 34 Cal. 2d 822 (1950), by noting that in that case, "there was not the slightest suggestion that by following the commission's orders disapproved [in that case], Pacific's subscribers would have been furnished better service." *General Tel. Co. v. Public Util. Comm'n*, 34 Cal. 3d 817, 827 (1983). Here, in contrast, the conditions we imposed on the holding companies – the requirement, for example, that the holding companies give their utility subsidiaries first priority – were designed precisely with ratepayer protection in mind.

[36] *Comments of Edison International on Draft Decision of ALJ Thomas on Motion To Dismiss For Lack of Jurisdiction* ("EIX Comments"), June 12, 2001, at 10-11.

[37] Indeed, the Court did not address any question of venue. The fact that *Henderson* was brought in Superior Court does nothing to support the position that the

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Instead, in its discussion of the second issue raised in that case, the Court held that the Commission "had jurisdiction" to impose the conditions. If the conditions were purely contractual, the Court would have had no reason to discuss the Commission's "jurisdiction." An entity does not require "jurisdiction" to enter into a contract.

B. The Holding Companies Are Barred From Collaterally Attacking The Commission's Prior Orders

Even if the conditions were not, in fact, valid Commission orders, but rather were merely clauses in a contract, the holding companies now would be barred from challenging our jurisdiction.

1. Bar on Collateral Attack Under Public Utilities Code Sections 1709, 1731

Neither the utilities nor the holding companies challenged our authority to impose and enforce conditions on the holding companies in the underlying proceedings. They may not now collaterally attack the validity and/or enforceability of those conditions. Read together, Sections 1731 and 1709 of the Public Utilities Code bar an untimely attempt to challenge the legality or reasonableness of a Commission decision. Pursuant to Public Utilities Code Section 1731, a party has 30 days after the date an order is issued to apply for rehearing. If no rehearing application is made, the party loses its right to file an

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Commission only has jurisdiction to enter into contracts with non-utilities, or that it can only bring actions against them in Superior Court. Venue in *Henderson* was in Superior Court because *Henderson* was a declaratory judgment action brought by a private party, and such an action cannot be brought before the Commission. *See Henderson*, 213 Cal. at 517 (noting action was for declaratory judgment); *The Windmill, Inc. v Alco Transportation Co.*, 21 CPUC 2d 142 (1986), conclusion of law no. 3 ("The Commission does not issue declaratory judgments").

action in any court.[38] Section 1709 provides that, "[i]n all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

Here, the Commission issued orders requiring the utilities and holding companies to take certain actions. None of the utilities or holding companies applied for a rehearing to contest the Commission's determination of its authority to impose and enforce these orders. Now, at this late date, their attempts to challenge the Commission's decisions are untimely and thus barred.

2. Equitable Estoppel

An entity may not seek an agency's approval of a particular act, obtain that approval subject to certain requirements, accept the benefits that flow from it, and later challenge the agency's authority to enforce the requirements while at the same time retaining the benefits of the approval. As the United States Supreme Court has explained:

> The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. *If the appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer.* The appellant accepted the transfer with the limitations contained in the certificate. The appellant now will not be heard to say it is entitled to receive more . . . .[39]

Without this rule, entities could regularly evade the requirement that they obtain agency approval before they engage in certain conduct. Knowing that the agency would not grant its approval except subject to certain conditions or

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[38] Cal. Pub. Util. Code § 1731(b).

[39] *Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 512 (1953) (emphasis added).

requirements, an entity could acquiesce to the agency's authority to impose the requirements, or simply remain silent, and only later – after having gained the agency's approval – challenge the requirements themselves. If successful, such a challenge would get the entity exactly what it otherwise never could legally have received: agency approval free from the challenged requirements. Other courts have reached identical conclusions on similar facts, holding that once an entity accepts the benefits of an agency's authorization made subject to conditions, the entity may not later challenge the agency's jurisdiction to have imposed the conditions in the first place.[40]

This principle is fully applicable here, and bars the holding companies' current challenge to our jurisdiction. The holding companies' belated acknowledgement that the conditions are enforceable – albeit in court, rather than at the Commission – is disingenuous at best. When we authorized formation of the holding companies and ordered them to abide by certain conditions, they did not protest. They never raised their theory that the conditions were but contractual provisions enforceable in a breach of contract

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[40] *See, e.g., Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 502 (1955) (company that accepted benefits of Federal Power Commission's decision authorizing merger, subject to certain conditions, estopped to collaterally challenge Commission's authority to impose conditions); *Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 513 (1953) ("the appellant, having invoked the power of the Commission to approve the transfer of the amended certificate to it, is now estopped to deny the Commission's power to issue the certificate"); *Kaneb Services, Inc. v. FSLIC*, 650 F.2d 78, 81-82 (5th Cir. 1981) (holding company that received FSLIC authorization to purchase bank, subject to certain conditions, estopped to collaterally attack those conditions by arguing that FSLIC lacked authority to impose them). None of these decisions, it should be noted, uses the phrase "jurisdiction to impose conditions" as meaning merely "authority to withhold approval if the entity refused to enter into a contract with the agency."

action in superior court. Indeed, in the very first proceeding authorizing the formation of a holding company, SDG&E conceded that the conditions were enforceable against the holding companies in Commission proceedings, citing, Section 2111 of the Public Utilities Code (discussed above):

> SDG&E responds that the Commission can enforce conditions as against both the utility and SDO. . . . SDG&E also cites Public Utilities Code Section 2111, et seq., as evidence of the Commission's ability to enforce conditions should SDO breach any of them.[41]

Then, in response to certain jurisdictional questions raised by other parties – but not by SDG&E – SDG&E offered to enter into a contract, *in addition to the conditions*, if the Commission wanted:

> SDG&E proposes that, if the Commission deems it necessary, a contract, agreeing to the performance of the conditions adopted in this order, can and will be executed by SDG&E and SDO on behalf of the Commission, naming the Commission as the third-party beneficiary to the agreement. Under the contract, this Commission would, according to SDG&E, be entitled to sue SDG&E and/or SDO for specific performance of any of the conditions.[42]

The Commission declined that offer, relying on SDG&E's concession and our own assessment that the Commission had jurisdiction.[43] Clearly, if anyone had viewed the conditions as merely contractual, SDG&E's concession that they were enforceable under section 2111 would have been improper, and its offer to enter into a contract, apart from the conditions, unnecessary.

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[41] 20 CPUC 2d at 686.

[42] *Id.*

[43] *See id.*

In subsequent proceedings, no electric utility or holding company ever raised the issue of jurisdiction. Nor did they ever suggest that the conditions we imposed were merely contractual. Each subsequent proceeding relied on, and largely adopted, the conditions and analysis first propounded in the SDG&E proceeding, and there is no reason to consider that the status of the conditions and jurisdictional analysis in the subsequent proceedings should be any different. The parties in the subsequent proceedings all were fully on notice of the Commission's position, and that of SDG&E, in the first proceeding, and no party suggested that the conditions were not valid orders enforceable in a Commission proceeding. Moreover, the first SDG&E decision makes clear, had the Commission believed that the conditions were merely contractual, and unenforceable in Commission proceedings, there is little question that it would not have approved the utilities' applications to form holding companies.[44]

Once we showed an inclination to exercise our authority and enforce our own orders, however, the holding companies not only denied that we could enforce the conditions at all, but even claimed that their voluntary agreement to the conditions meant nothing. When we pointed out in the draft decision that if they truly believed we lacked authority to order them to obey the conditions they should have appealed the orders at the time, they changed their position. For the

[44] The Commission would not likely have approved an arrangement with such serious implications for ratepayers that left it with the sole remedy of suing the holding companies in court if they violated the conditions in the holding company decisions. The Commission has remedies against parties who violate its orders that go beyond those it might assert in contract, including the ability to impose penalties. Penalties and contract damages are two entirely separate remedies. The holding companies' agreement to be bound in contract is tantamount to an assertion that they should be treated differently from other parties on which we impose Commission-ordered conditions.

first time, they conceded that the conditions are enforceable, but argued that they were so only as contractual provisions. In this circumstance, the holding companies are estopped to take this position now. The upshot of the holding companies' present position is that they should be permitted to retain the benefits of the Commission's authorization of their formation, but under terms that the Commission would not have deemed adequate to give its authorization in the first place. As every court to have considered a similar issue has concluded, this result should not, and cannot, be permitted.

In their briefs, the holding companies insist that estoppel has no place here because, they assert, their claim is one of subject matter jurisdiction, and a party cannot ever be estopped from challenging subject matter jurisdiction. This argument lacks merit for three reasons. First, subject matter jurisdiction is jurisdiction over the *type of case*.[45] Here, the Commission plainly had jurisdiction over the type of case: the formation of a holding company under sections 854 or 818 of the Public Utilities Code. Second, the parties once again have changed their position in their comments. As PG&E Corp. concedes in its comments on the proposed decision, for instance, what the holding companies are talking about really is jurisdiction over *the parties*.[46] "Estoppel may operate to confer jurisdiction over the parties to a controversy. . . ."[47]

Third, this is not the usual case. In the usual case, when a court or agency decision is voided for lack of subject matter jurisdiction, the parties are

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[45] *See Abelleira v. Court of Appeal*, 17 Cal. 2d 280, 288 (1941).

[46] *See, e.g., PG&E Corporation's Comments on Draft Decision on Motion to Dismiss For Lack of Jurisdiction ("PG&E Corp. Comments")*, June 12, 2001, at n.7 and accompanying text.

[47] *Summers v. Superior Ct.*, 53 Cal.2d 295, 298 (1959).

back to where they were had the judgment never issued.[48] Here, accepting the holding companies' position would not return the parties – or, more significantly, ratepayers – to the positions they would have been in had the holding companies timely objected to the Commission's assertion of jurisdiction. Had the holding companies, during the proceedings in which they applied to form, taken the position they now take, we would have rejected their applications, and today they would not exist. If we were to accede to the position that the holding companies now assert, they would, as the Supreme Court put it, "receive more" than they could have received had they timely raised the issue.[49] They would get both their authority to form and the benefits derived therefrom *and* freedom from conditions enforceable in Commission proceedings. Similarly, ratepayers would receive less than they deserve: full protection from the risks inherent in the formation of the holding companies.

C. The Commission Has Jurisdiction In This Proceeding To Enforce The Conditions Imposed In The Underlying Proceedings, And To Investigate Whether New Conditions Must Be Imposed

Pursuant to our authority to reopen proceedings to reexamine our earlier decisions under Section 1708 of the Public Utilities Code, our authority to impose these conditions includes authority to change those conditions prospectively if experience proves that the original conditions imposed did not protect the public interest and maintain ratepayer indifference, as they were intended to do. We note further that the holding companies undoubtedly were on notice from the

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[48] *See generally* Witkin, *California Procedure* § 12 (collecting cases) (4th ed. 1996).

[49] *Callanan*, 345 U.S. at 512

outset that we only would, and could, approve their formation provided that their formation would not adversely affect ratepayers. They also were on notice that we might have to revisit the conditions we imposed.[50]

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Pursuant to Pub. Util. Code § 311(g)(3), the 30-day period for comment on the draft decision was reduced to 5-1/2 days due to public necessity. Moreover, pursuant to Pub. Util. Code § 311(g)(2), and due to an unforeseen emergency situation, the 30-day period for comments on this draft decision was reduced to the same period. Here, both the "public necessity" and "unforeseen emergency" provisions are implicated by the utilities' – especially Edison's – financial situation. It is essential, we believe, that we lift the cloud of uncertainty surrounding the issues in this proceeding by informing the parties, the public and the financial markets how we will decide the jurisdictional issues in this proceeding. PG&E Corp., EIX, SDG&E/Sempra, ORA, and CCSF filed comments.

Each holding company Respondent claims the draft decision misunderstood its arguments. Respondents now concede we have the power to enforce the conditions, but claim we may only do so in court.

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[50] *See, e.g., Re Pacific Gas & Elec. Co.*, D.99-04-068, 194 PUR4th 1, 13 (1999) (expressly holding that it might be "necessary to impose additional financial conditions on the energy utilities with respect to their holding company operations" at a future date). (It is worth observing that in this statement the Commission also once again recognized the unity of interest between the holding companies and the utilities, referring to the "holding company operations" as being operations *of* the utilities themselves.)

We address these comments above. In summary, what each Respondent fails to acknowledge is that the draft decision does not hold the Commission has general power to regulate the holding companies or that the holding companies are public utilities. Rather, it concludes that (1) the Commission had authority to impose the conditions, and they thus constitute part of a valid Commission order; (2) the Commission has the power to enforce its own orders; and (3) the holding companies are estopped from challenging the Commission's order imposing the conditions. Far from representing "a radical departure from basic legal principles,"[51] the draft decision is entirely consistent with the law.

We reject Respondents' remaining arguments.

Findings of Fact

1. In 1985, SDG&E applied to the Commission to reorganize under a holding company structure. Although the Commission approved that application, subject to certain conditions imposed on both the utility and its new holding company, SDG&E decided not to form its holding company at that time, primarily because it disliked the conditions imposed on it and its holding company.

2. In 1988 the Commission approved, pursuant to section 854 of the Public Utilities Code, SCE's application to reorganize under a holding company structure. The approval was made expressly contingent on a number of conditions, which were determined to be necessary to protect the public interest and maintain ratepayer indifference. These conditions were applicable to both to the utility and its holding company. The approval also was made expressly contingent on the agreement of the utility and the holding company to those

[51] PG&E Corp. Comments at 1.

conditions. SCE filed a written acceptance of the conditions with the Commission.

3. In 1995, the Commission approved, pursuant to Section 818 of the Public Utilities Code, SDG&E's second application to reorganize under a holding company structure. The approval was made expressly contingent on a number of conditions, which were determined to be necessary to protect the public interest and maintain ratepayer indifference. These conditions were applicable to both to the utility and its holding company. The approval also was made expressly contingent on the agreement of the utility and the holding company to those conditions. Both SDG&E and its holding company's boards of directors passed a resolution agreeing to those conditions, and filed it with the Commission.

4. In 1996 and 1999, the Commission approved, pursuant to Section 818 of the Public Utilities Code, PG&E's second application to reorganize under a holding company structure. The approval was made expressly contingent on a number of conditions, which were determined to be necessary to protect the public interest and maintain ratepayer indifference. These conditions were applicable to both to the utility and its holding company. The approval also was made expressly contingent on the agreement of the utility and the holding company to those conditions. Both PG&E and its holding company's boards of directors passed a resolution agreeing to those conditions, and filed it with the Commission.

5. In 1996, Enova Corporation was SDG&E's holding company. That year, Enova applied to the Commission to merge with Pacific Enterprises, to form a new holding company, which ultimately became Sempra Energy. The Commission that application in 1998. The approval was made expressly contingent on a number of conditions, which were determined to be necessary to

protect the public interest and maintain ratepayer indifference. These conditions were applicable to both to the utility and its holding company. The approval also was made expressly contingent on the agreement of the new holding company to those conditions. The new holding company's board of directors passed a resolution agreeing to those conditions, and filed it with the Commission.

6. Each utility and each holding company agreed to the conditions the Commission imposed in its decisions authorizing the formation of the holding companies, either expressly in writing or implicitly by accepting our approval and proceeding to reorganize.

7. In the first SDG&E proceeding, the Commission's jurisdiction to enforce conditions against the holding company was raised. SDG&E conceded that the Commission had jurisdiction to enforce the conditions against both it and its parent company, citing, for example, section 2111 of the Public Utilities Code. SDG&E offered, quite apart from the conditions, to execute a contract that could be enforced in Superior Court. The Commission rejected that challenges to its jurisdiction, and declined SDG&E's offer to execute a contract. These actions indicate that all concerned recognized that the conditions were valid Commission orders, enforceable in Commission proceedings. In the subsequent proceedings authorizing the formation of respondent holding companies, neither respondent utilities nor respondent holding companies challenged the Commission's jurisdiction or authority to impose or enforce the conditions it did on the holding companies, either in the underlying proceedings authorizing the formation of the holding companies or in an application for rehearing of those decisions.

8. There is no evidence in the decisions authorizing the formation of the holding companies to suggest that either the Commission or any of the parties

believed the conditions to be only in the nature of contractual provisions, or that they would be enforceable only in an action brought in Superior Court.

9. The holding companies have reaped large benefits as a result of our approvals of their formations, as set forth, in part, in the Order Instituting Investigation in this proceeding, slip op. at 5-9.

Conclusions of Law

1. The Commission has jurisdiction to enforce its own orders in proceedings before the Commission. This jurisdiction extends to orders respecting public utilities, as well as to orders respecting other entities that are not utilities.

2. The Commission had jurisdiction to impose conditions on the holding companies as a prerequisite to its approval of their applications to form. Those conditions are valid Commission orders, not mere contractual provisions, and as such are enforceable in proceedings before the Commission.

3. The holding companies' are barred by Sections 1709 and 1731 of the Public Utilities Code from collaterally attacking the Commission's authority to impose conditions on them that are enforceable in Commission proceedings.

4. The holding companies, having agreed to the conditions the Commission imposed, and having accepted the benefits of the approvals for their formation, are estopped to challenge the validity those conditions as valid Commission orders enforceable in Commission proceedings.

5. Pursuant to Sections 818 and/or 854 of the Public Utilities Code, the Commission had subject matter jurisdiction in the underlying proceedings to determine whether the utilities' applications to reorganize under a holding company structure should be approved, and whether that approval should be contingent on the conditions we imposed.

6. Pursuant to section 1708 of the Public Utilities Code, the Commission has jurisdiction to modify, clarify, or add to the conditions initially imposed in the underlying proceedings.

O R D E R

IT IS ORDERED that respondent holding companies' motions to dismiss are **DENIED**.

This order is effective today.

Dated January 9, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

We will file a joint dissent.

/s/ HENRY M. DUQUE
/s/ RICHARD A. BILAS
Commissioners

I will file a concurrence.

/s/ GEOFFREY F. BROWN
Commissioner

Dissent of Commissioner Henry M. Duque and Commissioner Richard A. Bilas:

Respondents PG&E Corporation (PG&E Corp.), Edison International (EIX), and Sempra Energy (Sempra) (collectively, the holding companies), move to dismiss for lack of subject matter jurisdiction. The respondent holding companies contend that the Commission lacks jurisdiction over them because they are not public utilities. We agree and hereby dissent from the majority decision.

The Commission has jurisdiction over the electric utilities to impose and now enforce conditions relating to the holding company structure. More specifically, the Commission has jurisdiction over the electric utilities to have conditioned our reorganization approval on them securing the agreement of their respect holding companies. The resulting agreements are neither a legislative nor a constitutional grant of jurisdiction over the non-public utility holding companies, however, contrary to the majority decision, subject matter jurisdiction cannot be created by applying the doctrines of estoppel, waiver or unclean hands based on the agreements. The majority decision likewise cannot conjure up subject matter jurisdiction merely by stating that it never intended to relinquish jurisdiction which never existed in the first place.

The agreements, while not conferring subject matter jurisdiction, are nevertheless binding on the holding companies. Indeed, the holding companies acknowledge that the agreements are binding and enforceable in superior court. The Commission can authorize its General Counsel to file in superior court if necessary to enforce the agreements against the holding companies.

In a companion decision issued concurrently in this proceeding, the Commission took its first step in enforcing the agreements.[52] The Commission ostensibly defined the "first priority" condition contained in the agreements. More accurately, through "broad readings" and "expansive interpretations," the Commission erroneously redefined every basic term in the fields of economics as well as finance and then distorted its own record.

Illusive regulatory conditions such as the ones applied in these two majority decisions are erroneous and undermine the confidence of parties in

[52] After a motion to unhold Item 1 ("The First Priority Condition Decision") passed by a vote of 3-2, the Commission voted on Item 1. Item 1 passed by a vote of 3-2, with Commissioners Duque and Bilas voting no.

acting on Commission direction. The majority decisions send the message that the Commission can on a whim rewrite conditions whether the parties originally agreed to them or not. We have serious reservations about this aspect of the majority decisions because it establishes an unenforceable, ever-shifting standard that makes our process unreliable and thus harmful to the California economy. Absent a clear set of guidelines to the particular regulated industry, business will either seek a less hostile environment to operate or place an extremely high-risk premium on doing business in California. Equally important is to restore confidence in the integrity of the Commission and its decisions. The subject motions for lack of jurisdiction should have been granted, and the respondent holding companies dismissed from our proceeding.

III. Background

In 1985, San Diego Gas and Electric Company (SDG&E) filed an application under Section 854 of the Public Utilities Code[53], to reorganize under a holding company structure.[54] SDG&E sought to form a new holding company to which SDG&E would transfer ownership of all of its common stock and all of its non-utility subsidiaries. According to SDG&E, this reorganization was necessary because of trends toward deregulation and increasing competition in the electric industry. The Commission approved that application, subject to a variety of conditions that it found necessary to protect the public interest.[55] SDG&E ultimately decided not to form its holding company at that time.

One year later, Southern California Edison Company (SCE) applied, also under Section 854, to reorganize under a holding company structure.[56] According to SCE, the primary purpose underlying the proposed reorganization was to "face the new challenges resulting from the partial deregulation of the traditional electric utility business." We approved the application, once more subject to certain conditions designed to protect the public interest.[57] We

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[53] Unless otherwise indicated, all further statutory references are to the California Public Utilities Code.

[54] *See* Application (A.) 85-06-003.

[55] *See* D.86-03-090, (1986) 20 CPUC2d 660, 669-70, 676-77, 690-92.

[56] *See* A.87-05-007.

[57] *See* D.88-01-063, (1988) 27 CPUC2d 347, 374-75.

intended the conditions to mitigate the dangers stemming from the reorganization so that ratepayers would be indifferent to the change. As required by the Commission's order, SCE filed a written notice agreeing to the conditions.

In 1995, SDG&E returned to the Commission, once again seeking authorization to reorganize under a holding company structure.[58] At the time, the Commission determined that the reorganization involved no change in actual control of SDG&E, and therefore decided the application could proceed under Section 818, rather than Section 854. Despite this difference, we once again imposed certain conditions on the utility and its holding company as a prerequisite to our approval, designed to maintain ratepayer indifference and protect the public interest.[59] And, once again, we required the utility and holding company to pass board resolutions signifying their agreement to those conditions. Both the utility and its holding company passed such resolutions signifying their agreement.

The same pattern continued in two more applications. In 1996, Pacific Gas and Electric Company (PG&E) applied under Section 818 of the Public Utilities Code to reorganize under a holding company structure.[60] We approved that application, subject to a number of conditions designed to maintain ratepayer indifference and protect the public interest, and subject to the agreement of PG&E's and its holding company's boards of directors.[61] The following year, SDG&E's parent holding company, Enova Corporation, applied to merge with Pacific Enterprises, to form a new holding company that would own SDG&E, and which eventually became Sempra Energy.[62] We approved this application pursuant to Section 854 of the Public Utilities Code, once more imposing certain conditions intended to protect the public interest, and requiring that the newly formed holding company agree to those conditions.[63]

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[58] *See* A.94-11-013.

[59] *See* D.95-12-018, (1995) 62 CPUC 2d 626, 649-52.

[60] *See* A.95-10-024.

[61] *See* D.96-11-017, 69 CPUC 2d 167, 181, 185 (1996); D.99-04-068, 194 PUR4th 1, 43-45 (1999).

[62] *See* A.96-10-038.

[63] *See* D.98-03-073, 184 PUR4th 417, 465, 498, 501-04 (1998).

On April 3, 2001, the Commission issued an Order Instituting Investigation ("OII") to investigate whether PG&E, Edison, SDG&E, and their respective holding companies, violated any of the terms of the holding company agreements. The subject motions to dismiss followed.

The holding companies in their motions acknowledge our jurisdiction to impose conditions on the reorganization, including that the electric utilities secure the holding companies' agreement. The holding companies also acknowledge their obligations to uphold the agreements which resulted. The holding companies contend that the agreements are enforceable in superior court, not in this proceeding. The holding companies argue that the Commission lacks subject matter jurisdiction because they are not "utilities" under the provisions of the Public Utilities Code. The holding companies add that subject matter jurisdiction may not be created or the jurisdictional defect cured by waiver, estoppel or unclean hands.

IV. Discussion

A. The Commission does not have jurisdiction over the non-public utility holding companies.

The Commission is a regulatory body that derives its powers from the Constitution and the Legislature. *Public Utilities Commission v.City of Fresno* (1979) 62 Cal. Rptr. 79. The Commission has no jurisdiction over an entity unless it falls within one of the enumerated classes of public utilities in Article XII, section 23 of the California Constitution,[64] or Section 216. *Television Transmission v. Public Utilities Commission* (1956) 47 Cal.2d 82, 84, 85. As we previously acknowledged, the "California Supreme Court has held that unless the entity is a public utility . . . the Commission is without power to issue any orders against the entity." *Westcom Long Distance, Inc. v. Pacific Bell* (1994) 54 CPUC 2d 244, 255 [D.94-04-082].

The Utility Reform Network (TURN) and the Office of Ratepayer Advocates ("ORA") concur that the "[t]he holding compan[ies] … are not subject to the direct jurisdiction of state regulatory Commissions."[65] ORA states that

[64] Section 23 has since been repealed. See now Article XII, Sections 3 and 5.

[65] *See* ORA's Opening Brief in Phase 2 (A.95-10-024); TURN Reply Brief on Jurisdictional Issues at 11.

"nothing in the California Constitution or the Public Utilities Code confers jurisdiction on the Commission to directly regulate the activities of a utility affiliate which is not itself a public utility."[66]

Neither Section 854 nor Section 818 extend the jurisdiction of the Commission to the regulation of non-utility corporations. Rather, the Commission has jurisdiction to ensure that the electric utility structures the reorganization in such a way as to protect the ratepayers. As explained by ORA, "[t]he Commission has only one opportunity to provide [ratepayer] protection – through this proceeding granting … conditional approval to reorganize. This is the Commission's only *jurisdictional* opportunity to protect ratepayers from the costs and risks of [the] *unregulated* activities [of the resulting holding company]."[67]

Furthermore, the power of the Commission under Section 701 to do all things "necessary and convenient" only pertains to our exercise of jurisdiction over public utilities. Section 701 does not "confer upon the Commission any [independent] authority." *Assembly of the State of California v. Public Utilities Commission* (1995) 48 Cal. Rptr. 2d. 54. The California Supreme Court has expressly "rejected a construction of Section 701 that would confer upon the Commission powers contrary to other legislative directions, or to express restrictions placed upon the Commission's authority by the Public Utilities Code. " *Id.* at 89.

B. The Commission may enforce the holding company agreements in superior court.

The California Supreme Court has also made clear that conditions agreed to by a non-public utility, while not establishing Commission jurisdiction, are binding and enforceable in superior court. *See Henderson v. Oroville-Wyandotte Irrigation District* (1931) 213 Cal. 514, 529. The holding companies are therefore bound to uphold the agreements. In fact, the holding companies have never

[66] *Id.* at 19.

[67] *See* ORA Opening Brief in Phase 2 (A.95-10-024).

claimed that the Commission may not now enforce these conditions in superior court.[68]

Henderson is analogous to the instant case. *See id.* In *Henderson*, two public water utilities sold their systems to an unregulated district. The Commission had approved the sale only after the district agreed to charge outside water users the same rate as customers located within its boundaries. The district subsequently violated this agreement by overcharging outside users. The trial court found that the agreement was binding on the district.

The Supreme Court affirmed the ruling of the trial court. The Supreme Court expressly stated that the Commission did not have jurisdiction over the district. *Id.* at 524. The Supreme Court then went on to state that the Commission had jurisdiction to impose conditions on the sale of the public utilities, and the district was bound by those conditions:

> "While it is true that the [district] *is not in any manner under the jurisdiction of the Railroad Commission* … we know of no law, and none has been called to our attention by the district, which would permit the [District] to disregard the conditions under which [it] made [its] purchase." (emphasis added). *Id.* at 529.

Similarly, under Sections 818 and 854, we had jurisdiction to condition our approval of the reorganization and require that the utilities secure the agreement of the holding companies. The holding companies, like the district, were not public utilities subject to our jurisdiction. The holding companies expressly agreed to certain conditions, and they acknowledge that the conditions are

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[68] *See* Comments of San Diego Gas and Electric Company (U 902 M) and Sempra Energy on Draft Decision at 4 ("[SDG&E never] remotely suggested that the Commission lacked the jurisdiction to adopt or enforce the conditions."); Comments of Edison at 2 ("EIX concedes that implicit in the Commission's authority to approve or disapprove the holding company formation, was its right to refuse approval of the proposed holding company formation unless EIX and SCE agreed to observe certain reasonable conditions."); Comments of PG&E at 4 ("PG&E Corporation recognized the Commission's authority to issue the holding company decision and to require that Pacific Gas and Electric Company (the "Utility") secure PG&E Corporation's agreement to the conditions before the Commission approved the transaction.").

binding. Pursuant to *Henderson*, the Commission could file an action in superior court if necessary to enforce the agreements against the holding companies.

C. The holding companies are not barred from challenging the jurisdiction of the Commission.

We next refute the majority decision's arguments that the holding companies are barred from challenging the subject matter jurisdiction of the Commission. As established below, the holding companies are neither equitably estopped from challenging the Commission's jurisdiction nor barred from doing so by Sections 1731 and 1709.

1. Collateral attack is proper to contest lack of jurisdiction.

We are not persuaded by the argument that the holding companies are barred by Sections 1731 and 1709 from "collaterally attacking" the jurisdiction of the Commission.[69] The California Supreme Court has repeatedly held that "[c]ollateral attack is proper to contest lack of personal or subject matter jurisdiction . . . ." *Becker v. S. P. V. Construction Co.* (1980) 27 Cal.3d 489, 493; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950; *Swycaffer v. Swycaffer* (1955) 44 Cal.2d 689, 693. "While final orders and decisions of the [C]ommission are generally conclusive in all collateral actions and proceedings, that is only so as to determinations within the [C]ommission's jurisdiction."[70]

Peery v. Superior Court (1985) 174 Cal.App.3d 1085, does not stand for a contrary proposition. In *Perry*, a California trial court asserted jurisdiction in a custody battle and found in favor of the plaintiff. A Louisana court later heard the same case and awarded custody to the defendant. The defendant thereafter collaterally challenged the California court's subject matter jurisdiction over the

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[69] Pursuant to Section 1731, a party has 30 days after the date an order is issued to apply for rehearing. If no rehearing application is made, the party loses its right to file an action in any court. Cal. Pub. Util. Code § 1731(b). Section 1709 provides that, "in all collateral actions or proceedings, the orders and decisions of the Commission which have become final shall be conclusive."

[70] *Stepak v. American Tel. & Tel. Co.* (1986) 186 Cal.App.3d 633, 647 (citing Section 1709 of the California Public Utilities Code).

case. The appellate court found that the defendant was collaterally estopped from challenging the jurisdiction. *Id.* at 1094. The appellate court then proceeded to cite a number of collateral estoppel exceptions, applicable here, which permit a collateral attack for lack of subject matter jurisdiction.

A collateral attack is permitted where "the lack of jurisdiction is clear." *Id.* at 1094. *Perry* found this exception inapplicable because the child had resided in California for 6 months. Unlike *Perry*, the lack of jurisdiction in the instant case is clear and the exception applies. Neither the Constitution nor Sections 216, 818 or 854 confer jurisdiction over the non-public utility holding companies.

A collateral attack for lack of subject matter jurisdiction is also permitted when the court is of limited jurisdiction or when the jurisdictional issue was not previously litigated. *Id.* at 1094. *Perry* did not find either of these exceptions

applicable, yet both apply here. In contrast to the superior court in *Perry*, the Commission is an administrative agency with limited jurisdiction to regulate public utilities. Subject matter jurisdiction was also never litigated in this proceeding.

It appears that such a jurisdictional challenge would have been premature. The holding companies were not even parties to the proceeding. It is unclear as to what basis, if any, existed at the time for the holding companies to seek rehearing and/or judicial review. The holding companies did not then and do not now dispute their obligation to fulfill the agreements. Neither did the holding companies dispute our jurisdiction to require that the electric utilities secure their agreement as a condition for approving the reorganization. Therefore, it may not have been until the Commission asserted jurisdiction via its own enforcement proceeding, instead of in superior court, that the challenge became ripe for adjudication.

Furthermore, Sections 1731 and 1709 have no bearing on motions to dismiss for lack of subject matter jurisdiction. There is no bar against motions to dismiss for lack of subject matter jurisdiction because, as discussed below, subject matter jurisdiction may never be waived and can be challenged at anytime.[71]

For these reasons, there is no bar on collateral attack.

[71] *National Union Fire Ins. Co. v. Stites Professional Law Corp.* (1991) 235 Cal. App.3d 1718, 1723-24.

2. Subject matter jurisdiction cannot be created by estoppel.

The majority decision's argument that the holding companies are equitably estopped from challenging the Commission's subject matter jurisdiction is similarly flawed. "Subject matter jurisdiction in its strict sense refers to a court's or other tribunal's power or authority over the subject matter of *or the parties to* a dispute" (emphasis added).[72] Lack of subject matter jurisdiction includes an absence of authority over the parties , such as the holding companies.[73] It is a well-settled rule of law that subject matter jurisdiction may never be created through waiver or estoppel and that subject matter jurisdiction may be challenged at any time.[74]

We know of no case, including *Henderson v. Oroville-Wyandotte Irrigation District* (1931) 213 Cal. 514, that states a proposition to the contrary. This is because the water users in *Henderson* brought suit in the superior court to enforce conditions against the non-public utility. As such, there was no holding in *Henderson* that the non-public utility was estopped from challenging the jurisdiction of the Commission to initiate its own proceedings. The Supreme Court instead affirmed that the Commission did not have jurisdiction over the non-public utility.

Further, the non-binding federal cases cited in the majority decision are distinguishable and unpersuasive. There is no challenge to the subject matter jurisdiction of the agency in *Federal Power Commission v. Colorado Interstate Gas Co.* (1955) 348 U.S. 492, 502, *Callanan Road Improvement Co. v. United States* (1953) 345 U.S. 507, 513, or *Kaneb Services, Inc. v. FSLIC* (5th Cir. 1981) 650 F.2d 78, 81-82. Moreover, these cases do not hold that estoppel creates agency subject matter jurisdiction.

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[72] *Id.* at 1724 (citing *Abelleira v. District Court of Appeals* (1941) 17 Cal.2d 280, 288).

[73] *Trafficschoolonline, Inc v. Superior Court*, 2001 WL 534284 (Cal. Ct. App. May 21, 2001 at *5.

[74] *Summers v. Superior Court of Santa Clara County* (1959) 53 Cal.2d. 295, 298 ("jurisdiction over the subject matter cannot be conferred by consent, waiver or estoppel."); *National Union Fire Ins. Co. v. Stites Professional Law Corp.* (1991) 235 Cal. App.3d 1718, 1723-24 "Lack of subject matter jurisdiction can be raised at any time").

We next reject the argument that the doctrine of unclean hands bars the holding companies from raising a subject matter jurisdiction challenge. As explained *In re William T* (1985) 172 CA3d 790, the argument that a party "should be estopped to deny jurisdiction . . . because of unclean hands is more nonsense." "[F]or the same reason that subject matter jurisdiction cannot be conferred by consent, such jurisdiction cannot be assumed by virtue of the unclean hands doctrine." *In re Marriage of Ben-Yehoshua* (1979) 91 CA3d 259, 263, 268. We also reject arguments that to grant the subject motions would allow the holding companies to obtain by a fraud what they could not have otherwise obtained, namely the Commission's approval of the creation of the holding company structure. This is because the holding companies acknowledge that the conditions the Commission imposed are binding and enforceable.

Accordingly, the holding companies are not equitably estopped from challenging the Commission's subject matter jurisdiction.

3. The subject matter jurisdiction rubric is applicable.

Lastly, dismissal cannot be avoided by attempts by the majority decision to re-characterize the lack of subject matter jurisdiction as an act in excess of jurisdiction. As explained in *Abelleira v. District Court of Appeals* (1941) 17 Cal.2d 280, 288, lack of jurisdiction means an entire absence of power to hear or determine the case. *Abelleira* cites an applicable example of lack of subject matter jurisdiction as a proceeding beyond the jurisdiction defined for a court by statute or constitutional provision. *Id.* at 288. The holding companies challenge our proceeding as beyond the subject matter jurisdiction defined by the Legislature in Section 216 and the California Constitution.

This is readily distinguishable from a challenge to the exercise of our power over public utilities in a particular manner. That is, it is distinguishable from a challenge that an act was in excess of our jurisdiction. A court acts in excess of jurisdiction where, though the court has jurisdiction over the subject matter and the parties, it has no power to act except in a particular manner or to give certain kinds of relief. *Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1088. The holding companies are challenging the very existence of the Commission's power over non-public utilities and not just how it was exercised.

V. Conclusion

It is undisputed that the Commission has jurisdiction over the electric utilities to impose and enforce conditions relating to the holding company structures. Likewise, it is undisputed that we have jurisdiction over the electric utilities to require them to secure the agreement of their respective holding

companies in order to obtain reorganization approval. Yet the resulting agreements do not amount to an express jurisdictional grant, either from the Constitution or the Legislature, over the non-public utility holding companies. Subject matter jurisdiction cannot be created by waiver, estoppel or unclean hands based on the agreements. The Commission similarly cannot create subject matter jurisdiction by repeatedly stating that it never intended to give up jurisdiction which never existed anyway.

The agreements can still be enforced by continuing our proceeding solely against the electric utilities. The Commission can also file an action in superior court against the holding companies if necessary to enforce the agreements. While not conferring subject matter jurisdiction, the holding company agreements are still binding and enforceable in superior court. The subject motions for lack of jurisdiction should have been granted, and the respondent holding companies dismissed from our proceeding.

/s/ Henry M. Duque
Commissioner

/s/ Richard A. Bilas
Commissioner

January 9, 2002
San Francisco, California

Commissioner Geoffrey F. Brown, Concurring:

With this decision, the Commission has addressed the problem of defining its jurisdiction over holding companies of certain utilities. The Commission does not regulate all activities of such holding companies because they generally do not fall within the enumerated classes of Public Utilities in Article XII, Section 23 of the California Constitution or Section 216 P.U.C. Code. See Television Transmission v. P.U.C. (1956) 47 C 2d82, 84.85. However, in this decision, we find that under certain conditions, the P.U.C. has the authority (1) to define the obligations of a holding company to the utility with respect to agreements they have made at the time of their creation and (2) to enforce such obligations within the venue of the P.U.C. itself. It can exercise such authority by imposing binding conditions on the utility and the holding company expressing an intent to retain supervising authority to insure the fulfillment of the conditions. The conditions, of course, must relate to the operation of the utility for which the Commission has regulatory oversight.[75]

The utilities that are parties to this proceeding – SDG&E, PG&E, and Edison – all were authorized to spin-off and create holding companies. In doing so, the Commission required several conditions that were applicable to each utility and their soon-to-be created holding company. One such condition is the First Priority Condition which require each parent and the utility to give first priority to the capital requirements of the utility as determined to be necessary to meet its obligation to serve. The Commission is now seeking to define and possibly enforce that provision in a separate proceeding. [I.01-04-002]

Each utility agrees that the First Priority and any other provision contained in the orders establishing the parent companies is enforceable. However, they argue that they are enforceable only in a court of law, not within the Commission's quarters. The argument has a superficial appeal because it creates a clear demarcation of the Commission's jurisdiction. But it ignores the express power of the Commission to fashion orders in merger, acquisition or control activities of utilities as set forth in P.U.C. Section 854 [quoted in pertinent part]:

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[75] The decision does not address whether there are other conditions in which the PUC has authority over conduct of a holding company.

> … "The Commission may establish by order or rule the definitions of what constitute merger, acquisition or control activities which are subject to this section"…

In other words, the Commission can define the groundrules for a utility's re-organization, and that would include the power to define what remains within its control. 854 goes onto say:

> "No public utility organized or doing business under the laws of this state, and no subsidiary or affiliate of, or Corporation holding a controlling interest, shall aid or abet any violation of this Section"

That is to say, the holding companies must comply with the orders of the Commission relating to acquisitions, mergers and control activities as well what may be defined within the rest of 854.

In addition to this, P.U.C. Section 701 empowers the Commission not only "to supervise and regulate every utility" but also "To do all things, whether specifically designated in this part or addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." That, to my mind, means the P.U.C. can both set forth terms in a holding company order and retain such limited jurisdiction over the soon-to-be parent company to assure compliance with those terms. [76]

The record expresses the Commission's intent to retain a limited jurisdiction over each of the holding companies. In 1986, when SDO (Sempra's

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[76] Commissioner Duque's Alternate argued that Section 701 does not confer independent authority on the Commission citing Assembly of the State of California v. P.U.C. (1995) 48 Cal Rptr. 2d. 54. That is correct. However, if an order is pursuant to a valid statutory authority (Section 854, for instance), Section 701 gives the Commission a basis to set forth the means to exercise that authority. What Section 701 cannot do, as the court pointed out in Assembly v. P.U.C. supra at 64, is to contradict express legislative directives or express restrictions on Commission's authority. But in retaining jurisdiction here the Commission is not attempting to establish a new basis of authority. Rather, it is operating from an existing basis.

predecessor) sought permission to spin-off from SDG&E as its parent, opponents of the reorganization warned the Commission that it would lose control of the holding company and be unable to enforce the terms and conditions of a holding company order RE: SDG&E [86-03-090] 20 CPUC 2d 660, 686 (1986). SDG&E responded by suggesting that a contract be signed between SDO and SDG&E containing the holding company terms with the P.U.C. as a third party beneficiary with enforceable rights. The Commission explicitly rejected this approach. Seeking to answer the fears of the opponents, the P.U.C. said:

> "First, we reject the legal analysis of PSD and UCAN concerning this Commission's jurisdiction to enforce its orders. Section 854 vests in this Commission a broad authority to approve or deny applications for transfers of utility ownership or control. Implicit in this authority is the right to place reasonable conditions upon the transferor and/or transferee should a need for conditions be shown. SDG&E, on its own behalf and on behalf of SDO, itself argues this proposition. We cannot believe that the right to impose conditions carries with it no right to enforce those conditions; without the latter right, the former is meaningless. The contentions of PSD and UCAN to the contrary are not compelling.
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> "The Commission is empowered in myriad ways to secure compliance with its orders. The broad regulatory discretion described in the Public Utilities Act is ample evidence of that fact. SDG&E cites the most extreme example of our powers, the ability to pursue contempt remedies for regulatory law violations. SDG&E and SDO must, under the terms of Section 854, submit to the Commission's fullest authority if they in fact intend to consummate the transactions described in their application. Having so submitted, SDG&E and SDO need not execute their proposed contract; it would be a superfluous act in light of our existing authorities to pursue the enforcement of any of the foregoing adopted conditions.
>
> "SDG&E, throughout its showing in this proceeding and in its brief, acknowledges the potential severity of the consequences which would attach to SDO's or its own disregard of the conditions adopted by this decision. We concur with SDG&E's

> analysis and warn the utility and its parent that we intend to hold them to their promises to cooperate and abide by our orders. Should there be any failure to honor either the letter or spirit of SDG&E's or SDO's commitment, we will not hesitate to utilize the full breadth of our constitutional and statutory authority as well as application of the alter-ego doctrine to ensure compliance." [Id. at 686-687]

The Commission in the foregoing passage is saying that there is no need for a contract, "it would be a superfluous act." It is superfluous because the Commission already has authority and the power to enforce its orders within its own venue, (which explains the reference to its contempt power and the specific references to its ability to hold the parent to the condition). Although SDG&E did not accept the conditions in 1986, the SDG&E decision became a template for the SCE and PG&E holding company orders in 1988 and 1995 respectively and the interim order approving a holding company for SDG&E in 1998. In all the orders, the 1986 SDG&E decision was specifically referenced. SCE [88-01-063] 27 CPUC 2d 347, 363-371 (1988); PG&E [96-11-017] 69 CPUC 2d 167, 193 (1996); RE SDG&E [95-12-018] 62 CPUC 2d 626, 635 (1995)

In sum, authorizing holding companies under specified terms and conditions of retained jurisdiction was part and partial of the Commission's acknowledged jurisdiction of regulating utilities.

/s/ GEOFFREY F. BROWN
GEOFFREY F. BROWN
Commissioner

San Francisco, California
January 9, 2002